

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Clinton D. Vilardo,
Petitioner

v.

Case No. 1:06-cv-841

Warden, Lebanon Correctional
Institution,
Respondent

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter is before the Court on the Magistrate Judge's Report and Recommendation filed August 28, 2008 (Doc. 15).

Proper notice has been given to the parties under 28 U.S.C. § 636(b)(1)(C), including notice that the parties would waive further appeal if they failed to file objections to the Report and Recommendation in a timely manner. See United States v. Walters, 638 F.2d 947 (6th Cir. 1981). As of the date of this Order, no objections have been filed to the Magistrate Judge's Report and Recommendation.

Having reviewed this matter de novo pursuant to 28 U.S.C. § 636, we find the Magistrate Judge's Report and Recommendation to be correct.

Accordingly, **IT IS ORDERED** that the Magistrate Judge's Report is **ADOPTED** as follows:

1) Respondent's motion to dismiss is **GRANTED**. Petitioner's petition for

writ of habeas corpus is **DENIED** with prejudice.

2) A certificate of appealability will issue only with respect to petitioner's claims alleged in Grounds One and Three of the petition that he was denied his constitutional right of appeal and that his trial counsel was ineffective in failing to file a notice of appeal as requested by petitioner; under the applicable two-part standard established in *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000), "jurists of reason" would find it debatable whether this Court is correct in its procedural ruling and whether petitioner has stated viable constitutional claims in those grounds for relief. A certificate of appealability will not issue with respect to petitioner's remaining claims alleged in Grounds Two and Three of the petition because jurists of reason would not find it debatable whether petitioner has stated viable constitutional claims given that the *Blakely/Booker* line of cases cannot be retroactively applied to the instant case. See 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

3) This Court certifies that pursuant to 28 U.S.C. § 1915(a)(3) an appeal of this Order would be taken in good faith, and therefore GRANTS petitioner leave to appeal *in forma pauperis*. See Fed. R. App. P. 24(a); *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997).

SO ORDERED.

Date: September 18, 2008

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court